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**JAN 26 2005**

FILE:

EAC 03 069 55462

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Buddhist temple. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a minister. The director determined that the petitioner had not established that the position offered constitutes a qualifying religious occupation, or that the petitioner is able to pay the beneficiary's proffered wage.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The first issue is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

*Minister* means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

*Religious occupation* means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

Rev. [REDACTED] master-in-charge of Shibuya Temple, Tokyo, Japan, states that the beneficiary "was ordained on October 11, 1997. . . . Since 1997 [the beneficiary] has performed all the religious duties [of] a minister such as meditation, chanting devoted service and special religious prayer and chanting for the elderly, the sick, the repose of the dead and helping for variety of ceremonies [sic]." In a separate letter, Rev. [REDACTED] states that the beneficiary was ordained after "having satisfied all the requirements for ordination as a Mahayana Buddhist Minister."

Rev. [REDACTED] president of the petitioning temple, describes the beneficiary's duties:

[The beneficiary] will perform the following religious services for [the petitioning] Temple: Chanting, devotional service, recitation of the holy scriptures, special services for occasions such as birthdays, weddings, and funeral services; she will also participate in religious services for world peace, and conduct annual celebrations of the Buddhist calendar such as Buddha's Birthday.

The director denied the petition, in part because the petitioner had not shown that the position offered qualifies as a religious occupation. The logic underlying this finding is misplaced, because the petitioner had claimed that the beneficiary would be working not in a religious occupation, but in the vocation of a minister.

The director did not address the description of the beneficiary's duties in the context of the regulatory definition of "minister." Given that description, and the documentation of the beneficiary's ordination, it appears that the petitioner has adequately demonstrated that the beneficiary is, and seeks to be, a minister as the statute and regulations contemplate that term. We therefore withdraw the director's finding that the petitioner has not offered the beneficiary a qualifying position.

The next issue concerns the beneficiary's remuneration. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's initial filing contained no information to establish the proffered wage or the petitioner's ability to pay it. Therefore, the director instructed the petitioner to submit information regarding the terms of employment and remuneration, and "evidence . . . to establish the [petitioner's] net and gross annual income for 2001 and 2002" and "to establish the ability of the religious organization to pay the offered wages."

In response, Rev. [REDACTED] states that the beneficiary "will be paid about \$200.00 per week, plus free room and board, and other necessary expenses." The director, in denying the petition, claimed that the petitioner did not address the request for evidence of the petitioner's ability to pay the proffered wage. Review of the record, however, shows that the petitioner's response did cover this issue. The petitioner indicated that, as a non-profit organization, it has no tax returns to submit. The petitioner has, instead, offered a Form I-134 Affidavit of Support from [REDACTED] pledging to support the beneficiary. Mr. [REDACTED] is identified as a director of the petitioning temple and the owner of a Virginia restaurant. The petitioner

indicates that the temple has no paid employees, and that none of its officers draw a salary for their temple work.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

8 C.F.R. § 204.5(g)(2), by its plain wording, requires evidence that *the prospective United States employer* has the ability to pay the proffered wage. That employer is a corporation, which is a separate legal entity from any of its officers. The petitioner has submitted no documentation to establish the financial status of that corporation. The financial status of one of its directors is irrelevant, and Mr. [REDACTED] promise to meet the beneficiary's needs cannot serve as evidence of the petitioner's ability to pay the beneficiary.

On appeal, counsel observes that the petitioner owns the building where the temple is located, and that "[t]his property is worth over \$400,000.00 and is fully paid." Counsel also asserts that the petitioner "has a bank balance of over \$50,000.00."

The value of the petitioner's property is irrelevant, because that property does not represent liquid assets which could be used to pay the beneficiary's salary or expenses. Regarding the bank statement, the above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, the bank statement is dated September 23, 2003, and does not reflect the petitioner's financial condition as of the petition's December 2002 filing date. While this nine-month gap is fairly brief, it is far from inconsequential. For most of September 2003, the petitioner's bank account had a balance of less than \$2,500.00. The balance as of September 17 was \$1,190.04. On September 22, the day before the statement was issued, a credit of \$50,000.00 was added to the balance. This September 2003 deposit cannot and does not retroactively demonstrate that the petitioner was able to pay the proffered wage beginning in December 2002. If anything, the timing of the deposit (several weeks after the denial of the petition) raises questions about the purpose of that deposit. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements; a petition must be approvable based on conditions at the date of filing. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

The grounds discussed above are sufficient, by themselves, to warrant denial of the petition and dismissal of the appeal. Beyond those grounds, review of the record shows another ground that prevents the approval of the petition. The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The

petition was filed on December 20, 2002. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a minister throughout the two years immediately prior to that date.

The petitioner's initial submission includes a January 2002 letter from Rev. [REDACTED] who indicated that the beneficiary has served "as minister in the Atlanta, Georgia Buddhist Temple since Apr. 1999." Rev. [REDACTED] mentioned no other temple in the United States. Following the request for additional evidence, the [REDACTED] president of the petitioning order, stated that the beneficiary worked for the Atlanta temple "from April 1999 to April 2000. From April 2000 to the present [February 2003], she has served as a minister at the Nipponzan Myohoji Grafton Buddhist Temple in Petersburg, New York." On appeal, counsel states that the beneficiary served at the Atlanta temple "from March 1999 until April 2002," and at the Petersburg temple "since April 4, 2002."

The record does not contain any documentation from the temples in Atlanta or Petersburg to confirm when, if at all, the beneficiary worked at either location. The accounts from Tokyo and Washington are not first-hand, and the contradictory dates listed above further undermine the reliability of those accounts. The petitioner cites R-1 nonimmigrant visas issued to the beneficiary as evidence of her past work, but these visas were issued before the claimed work began, and thus the visas cannot prove that the *subsequent* work took place. Because of these discrepancies and deficiencies, we cannot find that the petitioner has reliably established the beneficiary's continuous work as a minister throughout the 2000-2002 qualifying period.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.